Multicultural Media, Telecom & Internet Council

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October 11, 2019

Rosemary Harold, Esq.
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street N.W.
Washington, D.C. 20554

Dear Ms. Harold:

RE: EEO Enforcement Reforms Capable Of Being Performed On Delegated Authority (FCC Docket No. MB-19-177)

The Multicultural Media, Telecom and Internet Council ("MMTC") respectfully responds to the September 20, 2019 Comments of the National Association of Broadcasters ("NAB September 20, 2019 Comments") and the September 20, 2019 Comments of ACA Connents – America's Communications Association ("ACA September 20, 2019 Comments") insofar as they each addressed the four proposals contained in MMTC's September 2, 2019 Letter ("MMTC September 2, 2019 Letter"). The MMTC September 2, 2019 Letter recommended four steps the Commission could take immediately, upon delegated authority, to improve EEO enforcement.

1. Substantially Increase The Percentage Of Employment Units Audited Each Year.

The NAB and ACA oppose our proposal to expand the number of units undergoing an audit. However, neither party disagrees with our observation that because only 5% of units undergo an audit every year, "this means that a unit is audited every 20 years—a length of time that far exceeds the typical station holding period."[1] These audits permit the agency to occasionally "trust but verify."

The NAB states that only attendant to grantmaking programs and EEO are audits undertaken.[2] But the lack of audits for other rules is irrelevant to the necessity of EEO audits.[3] EEO compliance is uniquely

[1] MMTC September 2, 2019 Letter at 3.

[2] NAB September 20, 2019 Comments at 4, 9.

[3] Indeed, the fact that broadcasters are no longer responsible for so many other compliance obligations (*e.g.* Fairness, ascertainment) in exchange for the privilege of having the protected use of valuable publicly-owned spectrum means that they have little reason to complain about the very few remaining compliance duties, such as EEO.

audit-worthy because compliance is seldom knowable except by insiders. As the D.C. Circuit has pointed out, "[d]iscrimination may be a subtle process which leaves little evidence in its wake."[4] On the other hand, engineering rule misconduct is generally discernable by members of the public.

The NAB also maintains that the low level of NAL's in response to audits justifies cutting back on the audit program.[5] Yet, the rarity of proven violations of a law is not proof that there is too much prescriptive or proscriptive law enforcement. No one would cut back on clean water, clean air, food safety, or auto safety enforcement audits because these audits rarely apprehend violators. The rarity of serious violations may mean any of three things: (1) that the audit program is a powerful deterrent to wrongdoing; or (2) the audit bar is so low that it fails to catch violators; or (3) over time, violators have figured out how to work the system so as to mask their noncompliance. Or it could mean a combination of these things. What it does *not* mean in the EEO context is that there is evidence of genuine nondiscrimination that would continue even if enforcement were diminished.

The NAB further claims that audits "require stations to collect and submit a substantial amount of information, including copies of the station's two most recent EEO public file reports, dated copies of all communications announcing every full-time position filled, a log of on-air job vacancy ads, information on interviewees and persons hired for every position, documentation of non-job-specific recruitment initiatives, and information about any complaints involving the station, among other things."[6] What the NAB fails to note is that nearly all of this information must *also* be maintained as part of customary modern personnel practice. In a professional work site, none of this information has to be created just for an audit.[7] Consequently, the actual cost of responding to an audit is negligible. It has long been settled that the EEO recordkeeping requirements are reasonable.[8]

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[4] *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 492 F.2d 656, 659 (D.C. Cir. 1974).

[5] NAB September 20, 2019 Comments at 4, 8.

[6] *Id.* at 7-8, fn. omitted.

[7] While it claims that responding to an audit "can cost $3,000 to $5,000" or more, the NAB candidly acknowledges that these numbers are "anecdotal." It provides no witness declaration, research citation, or other source, or even an explanation of what is included in these numbers. See NAB September 20, 2019 Comments at 8. Nor does the NAB explain why these (or other, more accurate cost figures) would not be cost-justified in deterring race and gender discrimination in broadcasting.

[8] In *MD/DC/DE Broadcasters Associations v. FCC,* 236 F.3d 13, 18 (D.C. Cir. 2001) (subsequent history omitted), state broadcast associations invited the D.C. Circuit to hold the Commission's recordkeeping requirements excessive, but the Court declined to do so. The Commission subsequently recognized the essential nature of recordkeeping and verification in EEO enforcement. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Notice of Proposed Rulemaking,* 16 FCC Rcd 22843, 22853 ¶32 (2001)

Finally, NAB recommends "eliminating the audit process, at the very least for station with 10 or fewer employees[.]"[9] For its part, ACA asks that any such lifting of the staff-size threshold for audits also be applied to cable systems.[10] That would be an awful mistake, as the Commission has long recognized.[11] Employment units with 5-10 employees often are the venues where those historically excluded from entry into the electronic media get their start. Diminishment of EEO enforcement would be especially "burdensome" to women and minority cable employees, who may have only one local employer to choose from.[12] The NAB's and ACA's undocumented non-crisis of "paperwork" does not justify any relaxation of the coefficients of the audit program.

2. Randomly Select Some Audited Units For More Thorough Review To Ensure Nondiscrimination At The Points Of Applicant Interviewing And Employee Selection.

In a footnote, ACA opposes enhanced, on-site audits. ACA cites no evidence or authority for its opinion that such audits would fail a cost/benefit test.[13]

It is, however, a fair point that any new regulatory initiative ought to pass a cost/benefit test. As explained by the EEO Supporters in their September 20 Comments, EEO regulation overwhelmingly passes that test because "[n]o one knows exactly how many instances of discrimination infect the media marketplace in a given year, but whatever the number, it's too

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("the justification for this documentation is self-evident. An employment unit must be able to demonstrate that it in fact took the steps required by our rules[.]")

[9] NAB September 20, 2019 Comments at 10.

[10] ACA September 20, 2019 Comments at 8-9.

[11] *See Equal Employment Opportunity in the Broadcast Radio and Television Services, Report and Order*, 2 FCC Rcd 3967, 3970 ¶22 (1987), in which the Commission retained the five-employee size cap because it "recognize[d] that small broadcast stations often offer opportunities for entry by women and minorities to employment and careers in the broadcast field." *See also Office of Communication of the United Church of Christ v. FCC*, 560 F.2d 531, 532 (2d. Cir. 1977) (holding that "[w]e grant the petition to review the order and set it aside as arbitrary and capricious insofar as it changes the policy of the Commission by extending the exemption for stations with fewer than five full-time employees to those with ten or less full-time employees.")

[12] As the ACA itself points out, small cable operators "often represent the sole provider of vital communications services in rural and other underserved areas." ACA September 20, 2019 Comments at 2 (fn. omitted). If race or gender discrimination at that sole work site ruins the career prospects of a minority or woman communications professional, her only option is to *leave town* and seek employment elsewhere. If anything is a burden, that is.

[13] *Id.* at 7 n. 22.

many."[14] That said, though, it is impossible to conduct a cost/benefit analysis of a new regulatory initiative, such as enhanced audits, when the new initiative does not yet exist.

There is a solution to this dilemma. The Commission can be faithful to its EEO goals *and* to its cost/benefit mandate by conducting a pilot program to test expanded audits and conduct an assessment of their practicality, cost, and impact. Pilot programs are a generally accepted mechanism by which a new regulatory initiative can be designed to maximize its impact and minimize its costs.[15]

3. Issue A Public Notice Reminding The Public Of The Agency's Whistleblower And Anti-Retaliation Protections, And Install A Secure Whistleblower Phone Line.

No oppositions to this proposal were lodged. It may be implemented forthwith.

4. Publish An EEO Primer, Best Practices, FAQs, And Model EEO Programs.

The NAB endorses, and ACA does not oppose, our proposal to have the EEO Staff produce and distribute materials designed to better inform industry and consumers regarding EEO, such as best practices guides and FAQs.[16] This proposal may be implemented forthwith.

[14] EEO Supporters September 20, 2019 Comments at 11-12.

[15] *See, e.g.,* Electric Power Research Institute, Guidebook for Cost/Benefit Analysis of Smart Grid Demonstration Projects, Revision 1, Technical Update, December 2012, at 1-1, available at https://www.smartgrid.gov/files/Guidebook-Cost-Benefit-Analysis-Smart-Grid-Demonstration-Projects.pdf (last visited September 25, 2019) ("The guidebook is intended to facilitate consistent and insightful implementation of Smart Grid pilot programs and experiments. Verifiable experimental results will facilitate extraction of research value from the demonstration projects, and promote deployment of the technologies in a manner that maximizes the benefits to customers, utilities and society.")

[16] *See* MMTC September 2, 2019 Letter, pp. 5-6; NAB September 20, 2019 Comments at 3 n. 11, and 13; ACA September 20, 2019 Comments at 7 n. 22.

Sincerely,

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